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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE O. CARDENAS,

Defendant and Appellant.

A128545

(Napa County  
Super. Ct. No. CR148685)

Jose O. Cardenas appeals following his plea of guilty to one count of violating Penal Code section 288, subdivision (a).<sup>1</sup> His appellate counsel has raised no issues and asks this court for an independent review of the record to determine whether there are any issues that would, if resolved favorably to defendant, result in reversal or modification of the judgment. (*People v. Kelly* (2006) 40 Cal.4th 106; *People v. Wende* (1979) 25 Cal.3d 436.) Defendant was notified of his right to file a supplemental brief, but has not done so. Upon independent review of the record, we conclude no arguable issues are presented for review, and affirm the judgment.

**BACKGROUND**

In March or April 2009, Jane Doe, who was 12 years old at the time, was sleeping over at a friend's house. She often did so. On this particular evening, her friend fell asleep as they were watching television in the living room. Her friend's brother, Cardenas, who was then 19 years old, came home and asked Doe if she wanted to "hang out" in his bedroom. They went into his room, sat on the bed, and watched television.

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<sup>1</sup> All further statutory references are to the Penal Code.

Cardenas put some blankets on the bed and asked Doe if she wanted to get in them, which she did. They chewed gum and blew bubbles, and then started kissing. Cardenas placed Doe's hand on his penis, she asked what he was doing and immediately moved it away. Cardenas then took off her pajama bottoms and underwear, mounted her, and inserted his penis into her vagina. He asked Doe if she was a virgin; she said, "yes." He got off of her and then orally copulated her. At one point Cardenas asked if she wanted him to stop, and she said, "no." When they saw Doe was bleeding, the sexual activity stopped. Doe got up to find a pad, did so and put her pajamas back on. Doe returned to Cardenas' room and fell asleep on the bed. Cardenas slept on the floor.

When her mother expressed suspicion that something had happened that evening, Doe denied anything had occurred "because I wanted it to go away." At some point in April, her mother spoke with a police officer, who told her to contact him if Doe ever disclosed she had had sex with Cardenas.

In October 2009, Doe was caught shoplifting and spoke with a female police officer, Tony McIntosh. She told McIntosh about the incident with Cardenas. Three officers in plain clothes went to speak with Cardenas at his home, and asked if he would return to the station with them in an unmarked car. Cardenas did so, and agreed to speak with Officer John McDonald at the station. He admitted to having sexual intercourse with Doe, but denied having oral sex. He also admitted he knew she was underage. He acknowledged what he had done was wrong, and he wrote a letter of apology to Doe.

On October 26, 2009, the Napa County District Attorney filed a criminal complaint charging Cardenas with three felony counts of a lewd act upon a child in violation of section 288, subdivision (a), and alleging special circumstances of a child under 14 years of age under section 1203.066, subdivision (a)(8). After a preliminary hearing, Cardenas was held to answer on all counts and the enhancement. The district attorney filed an information on November 25, 2009.

On December 7, 2009, Cardenas executed a change of plea form, pleading guilty to one count of violating section 288, subdivision (a). By executing the form, Cardenas expressly stipulated to a factual basis for his plea. The court found Cardenas freely and

voluntarily entered the plea. Cardenas then retained private counsel, and the proceedings were suspended 90 days for an evaluation and report under section 1203.03. The remaining counts were dismissed pursuant to a *Harvey* waiver.<sup>2</sup>

The sentencing hearing was held on March 24, 2010. Cardenas submitted a letter from his mother and made a statement of apology in court. Doe's mother also submitted a letter to the court. She stated that in addition to the sexual assault, Doe had been coerced by Cardenas' family into denying to her school assistant principal and to the police that anything had happened, and after she finally disclosed the incident, had been subjected to threats and harassment. She also stated Doe remained traumatized and was in therapy and under treatment for depression. The probation report indicated Cardenas had an escalating criminal record, had performed poorly on prior grants of probation and had been involved in several incidents of inappropriate behavior with younger girls. The psychological report, however, did not conclude Cardenas was a pedophile. Finding Cardenas was a risk to the community, the court denied probation and sentenced him to the midterm of six years.

### **DISCUSSION**

As a general rule, section 1237.5 precludes an appeal from a judgment of conviction after a plea of guilty unless the defendant has applied to the trial court for a certificate of probable cause for such an appeal and the trial court has issued such a document. However, appellate courts have tolerated an appeal if the issue is the validity of a search and seizure, for which appeal is proper under section 1538.5, subdivision (m), or goes to proceedings subsequent to the plea for purposes of determining the degree of the crime or the penalty imposed. (*People v. Shelton* (2006) 37 Cal.4th 759, 766; see also *People v. Buttram* (2003) 30 Cal.4th 773, 780.) Cardenas did not request or obtain a certificate of probable cause, so he is not able to challenge the validity of the plea or any other matter that preceded the entry of his plea. (*People v. Cole* (2001) 88 Cal.App.4th 850, 868.) In connection with his plea and thereafter, he was ably represented by

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<sup>2</sup> *People v. Harvey* (1979) 25 Cal.3d 754.

counsel. He duly executed a waiver of rights form that contained all necessary advisements as to his constitutional rights and the potential immigration consequences of a plea. He had a full opportunity to present his case on mitigation at the sentencing hearing. And at sentencing, the court considered all relevant matters and made all necessary and appropriate findings.

**DISPOSITION**

After a full review of the record, we find no arguable issues and, therefore, affirm the judgment.

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Banke, J.

We concur:

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Marchiano, P. J.

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Dondero, J